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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 597

JAMES E. MILLS,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Judgment of the Supreme Court of Alabama on the following grounds:

1. The Judgment appealed from is not a final Judgment.

2. The appeal does not present a substantial Federal question.

3. The Judgment rests on an adequate non-Federal basis.

4. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

The Appellant, whether purposely or otherwise, neglected to point out in his Jurisdictional Statement, in referring to the Decision of the Supreme Court of Alabama on Pages 1,

2, and 3, thereof, that the Supreme Court of Alabama reversed and remanded the case to the Jefferson County Criminal Court, although the Decision appearing as Appendix A to the Jurisdictional Statement of Appellant shows this to be a fact.

ARGUMENT

THE RULING BELOW LACKS FINALITY SO AS TO GIVE THIS COURT JURISDICTION OVER THIS APPEAL.

There has been no final Judgment of the Supreme Court of Alabama which can be considered by this Court on appeal under Title 28, U. S. C. A., Section 1257, since the Supreme Court of Alabama reversed and remanded the case to the trial court where further proceedings can be had. *Polakow's Realty Experts, Inc., v., State of Alabama,* 319 U. S. 750-751, 87 L. Ed. 1705; *Rankin v. Tennessee,* 11 Wall. (U. S.) 380, 20 L. Ed. 175; *Heike v. United States,* 217 U. S. 423, 54 L. Ed. 821, 30 Supreme Court 539; *Brown v. South Carolina,* 298 U. S. 639, 80 L. Ed. 1372, 56 Supreme Court 759; *Eastman v. Ohio,* 299 U. S. 505, 81 L. Ed. 374, 57 S. Ct. 21.

The case must go back and be tried upon its merits, and final judgment must be rendered before this Court can take jurisdiction. There has been no pleading to or trial upon the merits. It may be that upon trial the Defendant will be acquitted on the merits. It may happen that, for some reason, the trial will never take place. In either of these events, there can be no conclusive judgment against the Defendant in the case.

In his Jurisdictional Statement, the Appellant cites certain decisions which he contends sustain the jurisdiction of

the Supreme Court of the United States to review the Judgment of the Supreme Court of Alabama on appeal.

The case of *Richfield Oil Corporation v. the State Board of Equalization*, 329 U. S. 69, 67 Supreme Court 156, 91 L. Ed. 80, did not involve a demurrer to a criminal charge as does the instant case. Neither did the case of *Pope v. Atlantic Coast Line Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094.

Brown Shoe Company v. United States, 370 U. S. 294, 82 Supreme Court 1502, 8 L. Ed. 2d 51, was an anti-trust case and did not involve an appeal under Title 28, U. S. C. A., Section 1257.

Brady v. State of Maryland, 373 U. S. 83, 82 Supreme Court 1502, 10 L. Ed. 2d 215, did not involve a demurrer to a criminal charge.

Local No. 438, Construction and General Labor Union v. S. J. Curry, 371 U. S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514, was a civil case.

NAACP v. Button, 371 U. S. 415, 83 S. Ct. 523, 9 L. Ed. 2d 405 was not a criminal case and involved the abstention doctrine.

Baggett v. Bullitt, 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377, likewise involved the abstention doctrine.

Hudson Distributors v. Upjohn Company, 377 U. S. 386, 84 A. Supreme Court 1273, 12 L. Ed. 394, was a fair trade case and did not involve a criminal charge.

Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 209, was an injunction suit brought under the Civil Rights Act with

regard to the validity of the Louisiana Subversive Control Act, and was not decided in the State Supreme Court, but was instituted in a United States District Court.

Freedman v. Maryland, 381 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, was a case in which the Defendant was convicted in a State Court and the Maryland Court of Appeals affirmed. There was no demurrer to a criminal charge involved in this case and no reversal and remandment as in the instant case.

Harmon v. Forssenius, 380 U. S. 528, 85 S. Ct. 117, was a class action brought in the United States District Court for the Eastern District of Virginia to construe the application of the 24th Amendment to the United States Constitution to the Virginia Poll Tax Law, and although the abstention doctrine was involved, the appeal jurisdiction of the Supreme Court was not a point of decision.

II.

THE DECISION OF THE SUPREME COURT OF ALABAMA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

So-called "Corrupt and Illegal Practices Acts" are to be found in the laws of practically every state in the Union, in England, throughout the Colonies and in the Federal statutes. 18 Am. Jur., Elections, Section 235, Pages 336, 337; 69 A. L. R. 377; 18 U. S. C. A. 591-612.

The law under consideration lies within the police power field and impairs only the right of free speech which includes the right to write and publish one's views. A law cannot be held invalid because unreasonable, unless and un-

til it appears beyond reasonable controvesy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. *State ex rel. LaFollette v. Kohler,* (Wis.) 228 N. W. 895, 69 A. L. R. 348, 376.

Against the impediments which particular governmental regulations (Corrupt Practices Acts) cause to entire freedom of individual action (in this case, seeking votes on election day by publishing and distributing an editorial in a newspaper), there must be weighed the value to the public of the ends which the regulation may achieve (order, peace, quiet, last minute political charges without opportunity to answer, etc.). The value to the public of the Corrupt Practices Act here under attack far outweighs the supposed infringement of the right of Appellee to solicit votes on an election day under the guise of free speech. *Schenck v. United States,* 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, 473; *Dennis v. United States,* 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, 1153; *Communications Assn. v. Douds,* 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.

Free speech cases are not an exception to the principle that the courts are not legislatures, and that direct policy-making is not their province. How best to reconcile competing interests is the business of Legislatures, and the balance they strike is a judgment not to be disturbed by the courts, but to be respected unless outside the pole of fair judgment. Unless there is want of reason in the legislative judgment, the courts will not declare such acts unconstitutional. In no case has this court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. The historical antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched

on matters within the range of political interest. *Dennis v. United States*, 341 U. S. 494 (538-540); 95 L. Ed. 1137 (1168-1169).

The statute grew out of turbulent times when all kinds of corrupt practices in connection with legislatures resulted in corrupt elections, and included among these practices were electioneering and the solicitation of votes on election day. This is indicated by the fact that the Act of 1915, on which the Code section is based, passed both Houses of the Alabama Legislature with only one dissenting vote. The idea evidently was to prevent the voters from being subjected to unfair pressure and "brain-washing" on the day when their minds should remain clear and untrammeled by such influences, just as this Court is insulated against further partisan advocacy once these arguments are submitted.

In his Jurisdictional Statement, the Appellant says that he "does not challenge the right of a state to regulate elections by statutes clearly, specifically and narrowly drawn to meet substantive evils which threaten the integrity of the electoral process" (P. 10). However, his contention seems to be that because he is a newspaperman, he is immune from the prohibitions of such an Act and is at perfect liberty to electioneer and solicit votes on election day when others are forbidden to do so. Why he should think that he has such a constitutional exemption is not clear. The only reason advanced by him is that this was a so-called "editorial." Regardless of whether it is styled "an editorial" or "a news item" the fact remains that in two places in the article, he suggested that the voters vote in favor of a Mayor-Council form of government. These passages read as follows:

> "It was another good reason why the voters should vote overwhelmingly *today* in favor of the Mayor-Council government," and

> "Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

An interesting and comprehensive article by Mr. John S. Bottomly of Harvard and Boston Universities entitled "Corrupt Practices in Political Campaigns," appears in Volume 30, pages 331-381 of "Boston University Law Review." After listing and discussing many practices at elections which have been prohibited by legislative acts in England, by the United States Congress and by the legislatures of practically all of the states, he makes the following observation:

> "Soliciting votes on election day. A rather common provision of election laws is one which makes it unlawful to solicit votes within a certain *distance* of a polling place, usually 100 to 300 feet. *Alabama, Montana, North Dakota* and *Oregon,* however, have gone even farther by prohibiting ALL solicitation or persuasion of voters on election day.' (Emphasis supplied.)

So far as we can discover, there has never been any serious contention that the right of free speech would be violated by a law prohibiting solicitation of votes in the election booth or in close proximity thereto. Thus, unlimited free speech must and has been temporarily interfered with when considering the matter of distance from and space around the voting places at the time the election is being held. Should not such reasonable policy regulations as to "politicking" on the day of election (the *time element*) be considered just as necessary as the *space* or *distance* element?

As this Court said in *Alabama State Federation of Labor v. McAdory,* ~~65 S. Ct. 1384, 89 L. Ed. 1725:~~ 246 Ala. 1, 18 So.2nd 810, 815

> "Another principle which is recognized with practical unanimity, and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social or political rights of the citizens, not guaranteed by the Constitution itself. Nor even if the courts think the Act is harsh or in some degree unfair and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative process and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom."

Freedom of speech is measured by public welfare and limited by it. Then, again, the real question here on this appeal is whether anyone (be he a speaker, writer, distributor of pamphlets on the street, a candidate, a "do-gooder," a bank president or a newspaper editor, or anyone else) can claim "freedom of speech" on election day in violation of a legislative pronouncement that such electioneering must cease on election day due to the potential disorder and unfairness and interference with voters that might arise from such unlimited "free speech." Such writer or speaker may, and at times will, be absolutely correct in the position he advocates on election day. But many others, using the same "free speech" or "free press," may be tricksters bent on undue influence at the last moment, spreading falsehood upon the best of candidates and issues with no chance for a reply. So "public welfare," in the way of unmolested voters on election day, demands cessation of seeking votes by "electeering" while ballots are being marked by the voters.

The value to the public of the statute here under attack far

outweighs the supposed infringement of the rights of the Defendant here. *Communist Party of the United States of America v. Subversive Activities Control Board,* 367 U. S. 1, 81 Supreme Court 1357, 1407, 6 L. Ed. 265.

Certainly, the individual liberty of Appellant was affected for one day only. It does not follow that this temporary halt to soliciting votes was not a reasonable exercise of the police power by the Alabama Legislature over fifty years ago.

III.

THE ACT UNDER WHICH THE APPELLANT WAS CHARGED IS NOT UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The words "electioneering" and "solicitation of votes" are clear enough in and of themselves and require no further definition. We respectfully submit that anyone of ordinary intelligence can comprehend their meaning. In fact, the Appellant, in the main part of his argument evinces a clear understanding of these terms, but he argues repeatedly that he, and he alone, is free to do these things on election day. He says, in effect, "I am above this law because I am a newspaper editor. Sure, it is a good law, but the Constitution says that I can do things other people cannot. I can politic all I want to on election day and you can't touch me, because I am a newspaper editor." If what the Appellant says is true, would not radio and television stations also be immune from prosecution for electioneering and soliciting votes for or against a particular candidate or proposition on election day?

There can be no unconstitutional vagueness or indefiniteness about terms which are so well understood.

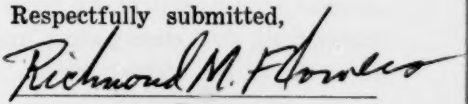
The attorneys filing this Motion desire to recognize the valuable services of the late Honorable Emmett Perry, Cir-

cuit Solicitor of the 10th Judicial Circuit of Alabama, whose research has been invaluable in the preparation of this Motion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or that the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,



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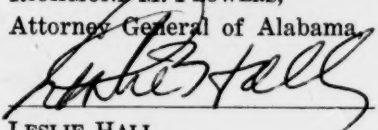

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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for the Appllee, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 20th day of October, 1965, I served the requisite number of copies of the foregoing Motion to Dismiss or Affirm upon Kenneth Perrine, 933 Bank for Savings Building, Birmingham, Alabama 35203, Attorney for Appellant, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to him at the address given.

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